

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

JOHN G. PEDICINI,	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	Case No. 04-12395-JLT
UNITED STATES OF AMERICA,	:	
MICHAEL JOHANNNS, SECRETARY,	:	
UNITED STATES DEPARTMENT OF	:	
AGRICULTURE, AND LINDA	:	
SPRINGER, DIRECTOR, UNITED	:	
STATES OFFICE OF PERSONNEL	:	
MANAGEMENT,	:	
	:	
Defendants.	:	

**DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT AND OPPOSITION
TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT**

Defendants, the United States of America, Michael Johanns,¹ Secretary of the United States Department of Agriculture ("USDA"), and Linda Springer,² Director of the United States Office of Personnel Management ("OPM"), by their attorney, Michael J. Sullivan, the United States Attorney for the District of Massachusetts, respectfully submit this Reply Memorandum in Support of their Motion for Summary Judgment dismissing Plaintiff John Pedicini's Complaint in its entirety. Defendants also

¹ Pursuant to Federal Rule of Civil Procedure 25(d)(1), the new Secretary of the United States Department of Agriculture, Michael Johanns, is hereby substituted for Ann M. Veneman as a defendant in this case.

² Pursuant to Federal Rule of Civil Procedure 25(d)(1), the new Director of the United States Office of Personnel Management, Linda Springer, is hereby substituted for Dan G. Blair as a defendant in this case.

oppose herein Plaintiff's Cross-Motion for Summary Judgment.

A. THERE ARE NO GENUINE ISSUES OF MATERIAL FACT IN DISPUTE

Plaintiff bizarrely argues that genuine issues of material fact exist in order to defeat Defendants' Motion for Summary Judgment, while simultaneously asserting that no material facts exist for the purposes of his cross-motion on the same claims. Notwithstanding Plaintiff's confusing argument, a close read of the record reveals that Plaintiff's objections to Defendants' statement of facts and his own proffered statement of facts are unsupported. Indeed, Plaintiff relies heavily on his own self-serving affidavit (which he submitted with his cross-motion and after his sworn deposition testimony) and the testimony of non-supervisory employees that contradicts the supported record evidence. And when he does cite to the record, he overstates or misrepresents what it actually says. Pursuant to Local Rule 56.1,³ the Court must ignore these unsupported statements and summarily strike them from his papers.⁴

³ Local Rule 56.1 states in relevant part: "Opposition to motions for summary judgment shall include a concise statement of the material facts of record as to which it is contended that there exists a genuine issue to be tried, with page references to affidavits, depositions and other documentation." L.R. 56.1.

⁴ There are many assertions in Plaintiff's objections to Defendants' Statement of Material Facts and his own Statement of Facts that are either inaccurate and immaterial or simply immaterial. Solely for purposes of this motion, the Defendants do not take issue with Plaintiff's objections to paragraphs 1-4, 8, 15-18, 22, 23, 29+, 33-38, 44, 54, 55, 57, 63, 66, 82, 83, 79+, 85, 92-94, 97, 99, and 101 of Defendants' Statement of Facts

For example, Plaintiff's objections to paragraphs 19, 20, 24, 25, 29, 73-75, 75+ and 76+ of Defendants' Statement of Facts and paragraphs 8, 11-13, 15, 17, 24, 25, 69, 77, 94, 97 and 98 of his Statement of Facts are based largely on his own self-serving deposition testimony and affidavit, and the testimony of agency employees, who admitted to having no managerial responsibility or decision- or policy-making authority. Plaintiff's "evidence," however, cannot refute the documentary evidence and testimony of employees with decision- and policy-making authority because it lacks foundation and is, therefore, irrelevant.

Indeed, neither Plaintiff nor his associates (i.e., Martin Hines, Bruce Potvin, Angela McElmurray Speshock, and Jonathan Lash) have or ever had the authority to create or interpret USDA policies or procedures concerning funds control. See Deposition of John Pedicini ("Pedicini Dep."), pp. 25-27, attached to Defendants' Statement of Facts as Exhibit 1; Deposition of Martin Hines ("Hines Dep."), pp. 251-255, 299-300, attached hereto as Exhibit A; Deposition of Bruce Potvin ("Potvin Dep."), p. 24, attached hereto as Exhibit B; Deposition of Angela McElmurray Speshock, pp. 23-29, attached hereto as Exhibit C; Deposition of Jonathan Lash, pp. 40-41, attached hereto as Exhibit D. Indeed,

or paragraphs 1-5, 9-11, 19, 20, 32-37, 39-41, 44-48, 50, 51, 53, 56, 58-60, 63-68, 71, 72, 74-76, 78, 79, 85, 87, 88, 91-93, and 95 of Plaintiff's Statement of Material Facts, because they are immaterial.

even Mr. Hines stated that one should not rely on his interpretation of agency policy but that of management employees. Hines Dep., pp. 299-300. Accordingly, the fact that Plaintiff or Mr. Hines, based on their own understanding of agency policy, has declared testimony from an employee with decision- and policy-making authority on which employees have the authority to certify funds availability "wrong" cannot create an issue of material fact. Similarly, Mr. Hines, based on his own belief, lacks the authority and support to declare that a document (which employees with decision- and policy-making authority have authenticated) is "irrelevant." Although Plaintiff benefits from all reasonable inferences favorable to him, he "may not rest upon mere allegations; [he] must set forth *specific* facts demonstrating that there is a genuine issue for trial." Oliver v. Digital Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988) (emphasis added). He cannot survive summary judgment with "unsupported allegations and speculations," but rather must "point to specific facts detailed in affidavits and depositions -- that is, names, dates, incidents, and supporting testimony -- giving rise to an inference of discriminatory animus." Lipsett v. Univ. of Puerto Rico, 864 F.2d 811, 895 (1st Cir. 1988). Clearly, Plaintiff's reliance on this so-called evidence fails to meet this standard.

Further, Plaintiff's reliance on the apocryphal "Federal Manager's Guide to Discipline" to support his contention that

letters of instruction are in fact disciplinary is misplaced. The handbook has not been properly authenticated by an agency employee with sufficient knowledge of the identify and use of the handbook. See Fed. R. Evid. 901. Indeed, Plaintiff was the only person in the course of discovery who identified the handbook as a book taught by the agency at the "USDA Graduate School." Pedicini Dep., p. 241-242. Plaintiff's statement, however, based entirely on hearsay, is not based upon any direct knowledge, and he has never held a manager or supervisor position within the agency nor has he gone through managerial training within the agency. Accordingly, the handbook is not admissible nor can Plaintiff's statements concerning it establish genuine issues of fact. See Carmona v. Toledo, 215 F.3d 124, 131 (1st Cir. 2000) ("Documents supporting or opposing summary judgment must be properly authenticated."); Hamilton v. Keystone Tankship Corp., 539 F.2d 684, 686 (9th Cir. 1976) ("Exhibits which have not had a proper foundation laid to authenticate them cannot support a motion for summary judgment.").

Plaintiff's repeated contention that Lisha Dorman "recanted" paragraph 12 of her affidavit is patently false. The record is clear that Ms. Dorman, during her deposition, testified that since March 2005 there is one exception to the rule she set forth in paragraph 12 of her affidavit, namely that there is no agency policy granting "backup funds officers" the authority to perform

all of the functions of a primary funds officer. Deposition of Lisha Dorman, p. 42, 92, attached hereto as Exhibit E. The exception to the rule, Ms. Dorman testified, is when a "backup funds officer" approves a request for travel in the agency's Integrated Acquisition System ("IAS") because the system does not segregate the functions of approval and certifying that funds are available for a travel request. Id., p. 43-44. Therefore, when a "backup funds officer" approves a travel request in IAS, technically, he or she is also certifying that funds are available for the travel request as a funds officer would for all other spending request. Id. Plaintiff's claim that Ms. Dorman recanted the paragraph is a clear misstatement of the record.⁵

The remainder of Plaintiff's objections to Defendant's Statement of Facts and his Statement of Facts contain nothing more than argumentative statements - most of which lack any support. In some of these paragraphs, Plaintiff, at best, raises as an issue the range of permissible inferences the Court can make from the undisputed facts. This, however, does not create

⁵ Plaintiff misrepresents Mr. Potvin's testimony when he claims that supervisor Roger Hamilton said the agency would not hire Plaintiff for the position of funds officer if it became open. Potvin Dep., pp. 17-19, 27-29. A read of the record evidence further demonstrates that Plaintiff misrepresents what the record says in his objections to paragraphs 5, 6, 21, 28, 30, 31, 48, 49, 53, 58-60, 65, 71, 76, 77+, 78+, 83+, 90, 100 and 103 of the Defendants' Statement of Facts and in paragraphs 14, 16, 18, 21-23, 26-31, 38, 42, 43, 49, 52, 54, 55, 57, 70, 73, 80-84, 86, 89, 90, 96, 99, and 100 of his Statement of Facts.

an issue of material fact. See, e.g., Hillstrom v. Best Western TLC Hotel, 354 F.3d 27, 28 (1st Cir. 2003).

The Defendants' Statement of Facts, however, is supported properly and not properly opposed on the facts discussed above. Because Plaintiff fails properly to controvert those facts, the "material facts of record set forth in [the government's concise statement of material facts] will be deemed for purposes of the motion to be admitted by [the Plaintiffs]" L.R. 56.1; see also Stonkus v. City of Brockton Sch. Dep't, 322 F.3d 97, 102 (1st Cir. 2003) ("Because the [plaintiff] did not controvert the statement of undisputed material facts that the defendants filed with their summary judgment motion, we deem those facts admitted"); GE Capital Healthcare Fin. Servs. v. Fall River Walk-In Emergency Med. Office, P.C., CA No. 02-11789-RCL, 2004 U.S. Dist. LEXIS 75, at *3 (D. Mass. Jan. 7, 2004). As such, the Court must take the government's proffered facts as true and undisputed. Given that the material facts are undisputed, this Court need only apply the law to resolve the Complaint.

B. CLOCKEDILE DOES NOT SAVE PLAINTIFF'S UNTIMELY RETALIATION CLAIMS

Plaintiff argues that under Clockedile v. New Hampshire Dep't of Corrections, 245 F.3d 1 (1st Cir. 2001), he had no obligation to contact an EEOC counselor and/or file a formal EEO complaint for the retaliatory acts he is claiming for the first time before this Court. A close examination of Clockedile,

however, reveals that it is inapplicable here. In Clockedile, the First Circuit held that certain retaliation claims, although unexhausted, are preserved "so long as the retaliation is reasonably related to and grows out of the discrimination complained of to the agency. . . ." Id., at 6. The First Circuit was concerned with retaliatory acts that arise after, if not as a result of, an employee's use of the EEOC process. See Kenney v. MNL Investors Servs., Inc., 266 F.Supp.2d 239, 245-246 (D. Mass. 2003). Indeed, the First Circuit explained that such retaliation "uniquely chills remedies; and by retaliating against an initial administrative charge, the employer discourages the employee from adding a new claim of retaliation." Clockedile, 245 F.3d at 5 (citation omitted). Here, in contrast, the retaliation Plaintiff complains of, with two exceptions, took place *before* he filed his last EEO complaint on November 22, 2004.⁶ Plaintiff's filing of this complaint shows that (1) the

⁶ The two retaliatory acts Plaintiff claims took place after he filed his November 22, 2004, complaint was (1) that he did not receive training that he requested in November 2004, and (2) that the agency has not allowed him to rotate into the superior position left vacant by Mr. Malone. Pedicini Dep., p. 99, 135. These claims, however, do not amount to adverse employment actions. See e.g. Blackie v. State of Maine, 75 F.3d 716, 725 (1st Cir. 1996) (for employment decision to constitute adverse employment actions under Title VII, "employer must either (1) take something of consequence from the employee, say, by discharging or demoting her, reducing her salary, or divesting her of significant responsibilities or (2) withhold from the employee an accouterment of the employment relationship, say, by failing to follow a customary practice of considering her for promotion after a particular period of service" (internal

alleged retaliation did not intimidate Plaintiff from filing a subsequent EEO complaint - which was the concern of the Clockedile court; and (2) he had the opportunity to exhaust these claims administratively before raising them here. Accordingly, the Clockedile retaliation exception does not apply.

C. PLAINTIFF'S RETALIATION CLAIM FAILS AS A MATTER OF LAW

1. Plaintiff Fails To Establish A Prima Facie Case Of Retaliation

In arguing that he has established a prima facie case of retaliation, Plaintiff opposes Defendants' arguments that (1) he never had the "right" to certify that Federally Appropriated Funds are available before spending actions occur; (2) even if Ms. Zorn had designated Plaintiff as a "certifying officer" or delegated to him the authority to certify that funds are available, the USDA's purported act of taking this function from him would not amount to an adverse employment action; (3) the three letters of instruction were not a form of discipline and had (and has) no effect on Plaintiff's employment, compensation, benefits, or grade level at USDA; and (4) the agency's training of his co-workers on Mr. Hines's functions has not caused Plaintiff any cognizable harm.

To counter Defendants' first argument, Plaintiff contends that (1) by virtue of being Mr. Hines's back-up, he also had the

citations omitted)).

right to certify funds availability; (2) Mr. Hines disputed Ms. Zorn's testimony and certain authenticated documents; (3) Ms. Zorn did not delegate to any employee the authority to certify funds availability until after Plaintiff filed an EEO complaint; and (4) he had the authority to certify funds availability on travel documents in IAS. As addressed in detail above, these contentions are based wholly on unsupported statements and misstatements of the record. Also, the record is clear from the Delegation of Authority memoranda that since at least May 26, 1995, the practice in NERO has been that the funds officer, his/her first-line supervisor, and his/her second-line supervisor have the authority to certify that funds are available before a spending action can occur. See Exhibit 15 to Defendants' Statement of Material Facts. The first of such memoranda pre-date not only Plaintiff's purported involvement in protected activities, but also his employment with the USDA all together. Id. The fact that Ms. Zorn did not author the memoranda prior to June 16, 2003, is irrelevant and certainly does not undermine the fact that the certification process described above was in place well before Plaintiff's involvement in any protected activities. Further, the USDA has never disputed Plaintiff's authority to approve travel documents, which his supervisors granted him as recently as February 2004 (well after some of the events at issue in this case). His authority concerning these requests is

irrelevant and his reliance on this fact is a clear attempt on his part to mislead the Court.

To counter Defendants' second argument, Plaintiff makes the unsupported argument that the right to certify funds availability is a "higher level right." Plaintiff's Opposition, p. 14. This unsupported statement, however, fails to address Defendants' arguments that when Plaintiff did perform the function of certifying that funds are available, unbeknownst to his superiors, he did so only one to three times a year; see Pedicini Dep., p. 191; and that this purported reduction of his duties has had no tangible effect on his compensation, benefits, or grade level. Pedicini Dep., pp. 78-83.

In opposition to Defendants' third argument, Plaintiff merely contends, relying on his unsupported observations and the purported "Federal Manager's Guide to Discipline," that the letters of instruction are forms of discipline. He also strangely emphasizes that while the agency has not placed the letters in his personnel file, it has kept copies in a supervisor's file. As addressed in detail above, the "Federal Manager's Guide to Discipline" is inadmissible and irrelevant to the issues before the Court. Also, the fact that copies of the letters of instruction are kept in a supervisor's file means nothing and certainly does not dispute Defendants' contention that the three letters had (and has) no effect on Plaintiff's

employment, compensation, benefits, or grade level at USDA. See, e.g., Nelson v. Univ. of Me. Sys., 923 F. Supp. 275, 282 (D. Me. 1996) (a letter of reprimand, by itself, does not constitute an adverse employment action under Title VII because such a claim is far too speculative).

2. Plaintiff Cannot Establish That USDA's Legitimate, Non-Discriminatory Reasons For Its Employment Actions Are Pretexts For Discrimination

It bears repeating that at this final stage of the McDonnell Douglas analysis, Plaintiff is required to show, unassisted by the original inference of discrimination, that the USDA's proffered reason is actually a pretext for unlawful discrimination. Thomas v. Eastman Kodak Co., 183 F.3d 38, 57-58 (1st Cir. 1999), cert. denied, 528 U.S. 1161 (2000) ("The plaintiff must present sufficient evidence to show both that 'the employer's articulated reason for laying off the plaintiff is a pretext' and that 'the true reason is discriminatory.'") (citation in parenthetical omitted); Mesnick v. Gen. Elec. Co., 950 F.2d 816, 823 (1st Cir. 1991). "In assessing pretext, a court's 'focus must be on the perception of the decisionmaker,' that is, whether the employer believed its stated reason to be credible." Mesnick, 950 F.2d at 825 (citations omitted). "It is not enough for a plaintiff merely to impugn the veracity of the employer's justification; he must 'elucidate specific facts which would enable a jury to find that the reason given is not only a

sham, but a sham intended to cover up the employer's real motive: [unlawful] discrimination.'" Id. Plaintiff can satisfy this burden through circumstantial evidence, such as, statistical evidence showing disparate treatment of members of Plaintiff's protected class, comments by decision makers that denigrate members of his class, and other incidences of differential treatment in the workplace. Id. at 824. It is clear, however, that he cannot meet this burden.

Indeed, Plaintiff's arguments that USDA's legitimate, non-discriminatory reasons for its employment decisions are a pretext for discrimination are based solely on the unsupported statements and misstatements of the record discussed in detail above. Simply put, Plaintiff has failed to demonstrate that Plaintiff's engagement in protected activity was a "determining factor" in any of the USDA's challenged decisions. See Mesnick, 950 F.2d at 825; see also Thomas, 183 F.3d at 57-58. Accordingly, his retaliation claims fail.

With regard to the remainder of Plaintiff's claims, Defendants rely on the arguments presented in its Memorandum of Law in Support of the Defendants' Motion for Summary Judgment.⁷

⁷ Defendants add only that Plaintiff's argument that the Court must find that the USDA breached the settlement agreement because the EEOC previously found so is specious. The doctrine of collateral estoppel provides "that when an issue of fact or law is actually litigated and determined by a valid and final judgment and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the

D. CONCLUSION

For the foregoing reasons, and for those contained in the Defendant's Memorandum of Law in Support of his Motion for Summary Judgment, this Court should enter summary judgment for the Defendants dismissing Plaintiff's Complaint in its entirety and deny Plaintiff's Cross-Motion for Summary Judgment.

Respectfully submitted,

Michael J. Sullivan
United States Attorney

BY: /s/ Damian W. Wilmot
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Dated: May 1, 2006

parties whether the same or different claims." Rogers v. Town of Northborough, 188 F.Supp.2d 10, 13 (D. Mass. 2002). Before a court may apply collateral estoppel, it must first determine: "1) that the issue at stake [is] identical to the one involved in the prior litigation; 2) that the issue has been actually litigated in the prior litigation; and 3) that the determination of the issue in the prior litigation [has] been a critical and necessary part of the judgment in that earlier action." Walker v. Kerr-McGee Chemical Corp., 793 F. Supp. 688, 694 (N.D. Miss. 1992)(citing Stovall v. Price Waterhouse Co., 652 F.2d 537, 540 (5th Cir. 1981)). There is no evidence in the record, for example, that the parties fully litigated this issue before the EEOC, nor is there any basis that the EEOC finding is binding on the Court. Therefore, the Court may review the undisputed record in determining whether summary judgment is warranted. As discussed in Defendant's Memorandum of Law, the Court should grant summary judgment in favor of the government on this claim.

CERTIFICATE OF SERVICE

I certify that on May 1, 2006, I caused a copy of the foregoing document to be served on *pro se* Plaintiff, John G. Pedicini, 10 Milano Drive, Saugus, MA 01906, by first class mail, postage pre-paid.

/s/ Damian W. Wilmot
DAMIAN W. WILMOT
Assistant U.S. Attorney

EXHIBIT A

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Civil Action
No. 04-12395 JLT

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PRESENT:

The Catapano-Friedman Law Firm
(By Robert S. Catapano-Friedman, Esq., and
Sarah Catapano-Friedman, Esq.)
50 Franklin Street, Boston, MA 02110,
for the Plaintiff.

DORIS O. WONG ASSOCIATES, INC.
(617) 426-2432 ~ Fax (617) 482-7813

1 obviously I reserve the right to follow up on
2 anything you ask him.

3 CROSS EXAMINATION

4 BY MR. WILMOT:

5 Q. Mr. Hines, I hope to move quickly so we can
6 get out of here. The one instruction I would add
7 that Mr. Catapano-Friedman didn't state in his
8 introduction is just to wait for me to finish my
9 question before you answer.

10 The importance of that obviously is that
11 when the reporter is writing down my questions and
12 your responses, it's not jumbled, that it's clear.

13 A. I understand.

14 Q. Mr. Hines, are you a member of the
15 management staff at USDA?

16 A. No, I'm not a supervisor nor a director.

17 Q. Do you have the authority to assign at USDA
18 an employee a certain grade level?

19 MR. CATAPANO-FRIEDMAN: Object to the
20 question, but you can answer.

21 A. Assign a grade level?

22 Q. Yes.

23 A. Grade levels are determined by
24 classification actions, so I don't quite follow what

1 you mean by that.

2 Q. My question is do you have the authority to
3 determine what particular grade level another
4 employee has?

5 A. No.

6 Q. Have you ever had this authority during
7 your employment at USDA?

8 MR. CATAPANO-FRIEDMAN: Object. You can
9 answer.

10 A. No. To assign a grade level to another
11 employee?

12 Q. Um-hmm.

13 A. No.

14 Q. Do you have the authority to give a USDA
15 employee a raise?

16 A. No.

17 Q. Have you ever had that authority?

18 A. Well, I was a supervisor up until 1994 or
19 '93.

20 Q. After 1994 or '93, have you ever had that
21 authority?

22 A. No, no. No, I'm no longer a supervisor so
23 the answer would be no. I don't have that
24 authority.

1 Q. Do you have the authority to promote a USDA
2 employee?

3 A. No.

4 Q. Since 1993 or 1994, have you ever had that
5 authority?

6 A. No.

7 Q. Do you have the authority to assign a USDA
8 employee a certain title?

9 A. No.

10 Q. Since 1993 or 1994, have you ever had that
11 authority?

12 A. No.

13 Q. Do you have the authority to assign a USDA
14 employee new job responsibilities?

15 A. Can you explain that a little more in terms
16 of what do you mean by "the authority"?

17 Q. The authority? Well, I suppose do you have
18 the independent authority without having to go to
19 someone above you I guess in management to assign an
20 employee new job responsibilities that they did not
21 have prior?

22 A. No. But in the instance of the alternate
23 backup funds officer in which John Pedicini was
24 assigned that responsibility in 1998 or '99, I was

1 directed by my supervisor at that time, Art LeBlanc,
2 to begin a process of providing that individual the
3 appropriate tasks that should be assigned to educate
4 and to orientate and to bring that individual up on
5 serving in that capacity.

6 Q. Put it another way, do you have the
7 authority to assign a USDA employee new job
8 functions?

9 A. No, no. I wouldn't. I would not. If
10 something new came out, a new function that came
11 down the pike, that would be a management decision.

12 Q. Since 1993 or 1994, have you ever had that
13 authority?

14 A. No, no. I never had the authority but I
15 would answer that question by an example. When the
16 new FFIS system came about as a clear example, both
17 myself and John Pedicini were designated to learn
18 that system and to attend formal training at
19 headquarters and then to operate the system.

20 Q. Do you have the authority to override an
21 employment decision made by USDA management?

22 A. No.

23 Q. Since 1993/1994, have you ever had that
24 authority?

1 A. No, I do not, no.

2 Q. Are you a --

3 A. These are management decisions. I'm
4 surprised you're asking me these questions.

5 Q. Lawyer stuff. Are you a union member?

6 A. No, I'm not.

7 Q. Are you a union representative?

8 A. No, I'm not.

9 Q. What is your grade?

10 A. 12.

11 Q. Just again what's your title, your official
12 title?

13 A. Well, let's see. After today there's about
14 six, I think. No, my official title on my position
15 description is budget analyst. By the way, your
16 official title also appears on your performance
17 appraisal in Block 8, budget analyst. Working
18 titles are different.

19 Q. What's your working title?

20 A. Well, the principal working title is funds
21 control officer.

22 Q. How many funds control officers are there
23 in your section?

24 A. There's myself and John Pedicini, the

1 Q. You're the --

2 A. I think I picked up a good title, PFO. I
3 like that, PFO.

4 Q. It's already been answered. We can move
5 on.

6 A. I'm sorry. I just -- I'm trying to be
7 helpful and constructive.

8 Q. I think you've been fantastic.

9 A. It's getting late in the day. I will look,
10 though, to see if there's other places because
11 believe me, I want to get to the bottom of this. I
12 would like to resolve this.

13 To me we're getting into semantics at this
14 point with how -- what is the intent of this written
15 memo, what is the intent of this language, what is
16 the intent of this -- these two words. The people
17 at headquarters are the people you need to ask as to
18 who this --

19 Q. I think you're right.

20 A. As to who is all encompassing with regard
21 to this.

22 Q. I think you're right. And management would
23 be the one to interpret what that means; isn't that
24 correct?

1 A. Yes.

2 MR. CATAPANO-FRIEDMAN: I'm objecting to
3 this. Objection.

4 A. But I'm only trying to do my job as I read
5 these things, too.

6 Q. I understand.

7 MR. CATAPANO-FRIEDMAN: I think the witness
8 is getting tired from the last comments that he's
9 made.

10 MR. WILMOT: Excuse me?

11 MR. CATAPANO-FRIEDMAN: The witness sounds
12 like he's getting tired.

13 MR. WILMOT: I'm still asking questions.

14 MR. CATAPANO-FRIEDMAN: Are you getting
15 tired?

16 THE WITNESS: I'd like to continue. I'd
17 like to stay very late if necessary.

18 MR. CATAPANO-FRIEDMAN: Do you need a break
19 if we're going to be going much later?

20 THE WITNESS: No.

21 (Discussion off the record)

22 MR. WILMOT: Can you tell me what I'm
23 supposed to provide?

24 MR. CATAPANO-FRIEDMAN: There was a memo

EXHIBIT B

Bruce Potvin 1-18-2006
John G. Pedicini v. United States of America, et al.

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1 UNITED STATES DISTRICT COURT
2 DISTRICT OF MASSACHUSETTS
3

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5 JOHN G. PEDICINI,
6 Plaintiff,

7 VS. CA No. 04-12395-JLT

8 UNITED STATES OF AMERICA
9 UNITED STATES DEPARTMENT
10 OF AGRICULTURE,
11 ANN M. VENEMAN, SECRETARY,
12 Defendants.
13 -----

14
15 Deposition of BRUCE POTVIN, a witness
16 called on behalf of the Plaintiff, taken
17 pursuant to notice before Cindy M. Falcon,
18 Certified Shorthand Reporter and Notary Public
19 in and for the Commonwealth of Massachusetts, at
20 the O'Neil Federal Building, 10 Causeway Street,
21 Boston, Massachusetts, on Wednesday, January 18,
22 2006, commencing at 10:00 a.m.

23
24

Bruce Potvin 1-18-2006
John G. Pedicini v. United States of America, et al.

17

1 MR. WILMOT: Objection.

2 A Yes.

3 Q That was your interpretation of the
4 conversation, the fact that you mentioned John
5 Pedicini's name, and Hamilton responded how to
6 that?

7 MR. WILMOT: Objection to the
8 question. You can answer.

9 A Okay. I'll go back. As I stated earlier, when
10 he stated that there would be an opening,
11 possible opening, that Marty was going to
12 possibly retire, and they would have to train
13 someone in his duties and that I had experience
14 in that area, that I would be involved.

15 And that's when I raised the statement,
16 again, that, wait a minute, there are people
17 over there that, A, must be helping Marty do
18 that, and B, I'm sure would be interested in the
19 position, words to that effect.

20 It was just a quick conversation, and
21 that's when his statement back was, well -- and
22 I said John Pedicini is one, and that's when he
23 made the statement, again, to go back, he's not
24 going to be involved in this, he's not going to

Bruce Potvin 1-18-2006
John G. Pedicini v. United States of America, et al.

18

1 get that.

2 Q Did you mention anybody else's name?

3 A No.

4 Q Just John Pedicini's name?

5 A I had raised his name and he acknowledged it.

6 Q And he said that John Pedicini was not going to

7 get that job?

8 MR. WILMOT: Objection.

9 Q Is that your testimony?

10 A It was that or when I raised your name the

11 reference was exactly: No, he is not.

12 Q Not meaning what; not going to get the job?

13 A Not going to get -- not going to be involved in

14 it, I think were his actual words.

15 Q You said that there were people -- excuse me.

16 You said that Hamilton told you in a

17 conversation they were looking to train people

18 in Marty's duties?

19 A If he retired?

20 Q Correct.

21 A Correct.

22 Q What was your interpretation of that? Was there

23 going to be a job vacancy?

24 A I took it as a job vacancy. As I stated, my

Bruce Potvin 1-18-2006
John G. Pedicini v. United States of America, et al.

19

1 experience with federal and private industry is
2 a position becomes vacant, the situation, the
3 position is posted, and people apply for it.

4 I mean, I know there there's ways of doing
5 it, but that didn't enter my mind.

6 Q Is it correct, did he say that they had to train
7 somebody in Marty's duties?

8 A Somebody would be trained. He did use the words
9 someone will be trained.

10 Q He used the word trained?

11 A Yes.

12 Q Did he mention anything about people already
13 being trained over there?

14 A No.

15 Q You mentioned that you told Mr. Hamilton in this
16 conversation that there were people qualified
17 over there for Marty's job. Did you say that?

18 A I did. I said: There's people that I'm sure
19 would be interested in this that must have --
20 must be qualified for that.

21 Q How did you arrive at that conclusion?

22 A Just with the idea that I watched and listened.
23 I sat on the other side. I've seen your
24 involvement in areas there and Kirk's.

Bruce Potvin 1-18-2006
John G. Pedicini v. United States of America, et al.

24

1 of the question.

2 A Boston-Yankees series.

3 Q It wasn't a bet?

4 A It was a hotdog between John Pedicini and Marty
5 and myself for Boston versus New York winning
6 the division.

7 Q Is that the first time you've had a lunch break
8 with John Pedicini?

9 A No, we had them before. We had three others
10 before that, because we had a standing hotdog
11 every 40 games between John, Marty and myself.

12 Q So you discussed baseball?

13 A Baseball, nothing -- anything but work.

14 Q What grade were you in September of 2004?

15 A GS-11.

16 Q And you stated you had applied for a Grade 13
17 position?

18 A Correct.

19 Q And how did you apply for that; as an external
20 internal candidate?

21 MR. PEDICINI: Objection.

22 A No, as an internal. I've been a GS-12 with the
23 federal government for at least 12 years.

24 MR. PEDICINI: Objection to the

Bruce Potvin 1-18-2006
John G. Pedicini v. United States of America, et al.

27

1 don't know.

2 Q Do you know when there is a vacancy who within
3 your office makes the hiring decisions in 2004?

4 A I really don't know how much Doug's involved in
5 this, in the final selection of that. I would
6 assume the branch chief or section chief would
7 make a selection. That's the way it's normally
8 done.

9 Q Just for my own sake, when you were discussing
10 this conversation, you mentioned that Roger
11 Hamilton mentioned that there was going to be
12 training for this position, and then you also
13 discussed somehow hiring for that position.

14 What exactly did you discuss in that
15 conversation?

16 A He said that there would be some training for
17 that position. It was my understanding -- I
18 didn't think about it that much because my
19 understanding is that's not really the way it
20 works from my experience, but so I just said,
21 okay, you know, with the conversation and then
22 left.

23 Q So when he discussed with you that you should
24 show some interest in this position, he was

Bruce Potvin 1-18-2006
John G. Pedicini v. United States of America, et al.

28

1 talking about showing interest in the training
2 for it?

3 A We never got to that because Marty was still
4 there. It would have been if Marty does retire.

5 Q So he said: If Marty does retire, we are going
6 to train some people on those functions?

7 A Someone's going to have to be trained, yes.

8 Q Did he say that someone was going to have to be
9 hired for that position?

10 A He used the word trained. I really don't
11 remember the word hired.

12 Q And also to clarify, Roger Hamilton did not
13 state John Pedicini's name during that
14 conversation; is that correct?

15 A I raised John Pedicini's name, and his answer
16 was: He will not or John Pedicini will not, it
17 was one or the other. But there was no question
18 in my mind about it.

19 Q That John Pedicini would not get training for
20 that position?

21 MR. PEDICINI: Objection to the
22 question.

23 A Whatever he meant by it.

24 Q Whatever he meant?

1 A Whatever he meant. I didn't ask.

2 MR. WILMOT: No further questions.

3

4 FURTHER EXAMINATION BY MR. PEDICINI:

5

6 Q When you had discussions in this conversation
7 with Mr. Hamilton, it came as a result of a
8 previous application somewhere for a higher
9 level position; is that correct?

10 A Yes.

11 Q And Mr. Hamilton's words -- I want to make
12 sure. You may have said this before. I want to
13 make sure I understand it.

14 Did you ask Mr. Hamilton or did the issue
15 come up in this conversation that you were
16 looking for another higher level position above
17 Grade 11?

18 A Not specifically, but obviously he knew I was
19 because I had applied for the 13.

20 Q And then this thing about Marty Hines retiring
21 came up in the conversation?

22 A Yes, correct.

23 Q Again, he said --

24 A There may be.

EXHIBIT C

Angela McElmurray 1-18-2006
John G. Pedicini v. United States of America, et al.

1

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF MASSACHUSETTS
3

4 -----

5 JOHN G. PEDICINI,
6 Plaintiff,

7 VS. CA No. 04-12395-JLT

8 UNITED STATES OF AMERICA

9 UNITED STATES DEPARTMENT

10 OF AGRICULTURE,

11 ANN M. VENEMAN, SECRETARY,

12 Defendants.
13 -----

14

15 Deposition of ANGELA McELMURRAY

16 SPESHOCK, a witness called on behalf of the
17 Plaintiff, taken pursuant to notice before Cindy
18 M. Falcon, Certified Shorthand Reporter and
19 Notary Public in and for the Commonwealth of
20 Massachusetts, at the O'Neil Federal Building,
21 10 Causeway Street, Boston, Massachusetts, on
22 Wednesday, January 18, 2006, commencing at 12:00
23 p.m.
24

1 sure about that.

2 It was actually written probably I would
3 say five years that the basics -- the
4 boilerplate was written five years before I
5 started in the budget division, and we just
6 revised it, did revisions to it.

7 So the vast majority of what you find in
8 there had to be revised when we went to the
9 FFIS. It's IFS at the IRS.

10 Q It's different at the IRS, sure.

11 MR. PEDICINI: Damian, I have no
12 further questions.

13 THE WITNESS: Here is funds control
14 procedures.

15

16 EXAMINATION BY MR. WILMOT:

17

18 Q I don't think there is a question before you. I
19 just have a couple of questions.

20 A I was going to look for my organizational
21 chart.

22 Q What was your grade level during the 1994 to
23 2003 period?

24 A GS-12.

Angela McElmurray 1-18-2006
John G. Pedicini v. United States of America, et al.

24

1 Q Were you a member or were you considered a
2 management employee by USDA during that time?

3 A Can you define that?

4 Q During that time frame, I'm talking about 1994
5 to 2003, did you have the authorized authority
6 to hire or fire other employees?

7 MR. PEDICINI: Objection to the
8 question.

9 A No.

10 Q Did you play any role in the hiring or firing of
11 other employees?

12 MR. PEDICINI: Objection to the
13 question.

14 A So I don't have to answer that?

15 Q I imagine it's an objection to the form.

16 MR. PEDICINI: Go ahead and answer.
17 Object to the form.

18 A No.

19 Q No?

20 A No.

21 Q Did you have any authority to assign titles --

22 MR. PEDICINI: Object to the form.

23 MR. WILMOT: You have to let me ask a
24 question.

1 MR. PEDICINI: Sorry.

2 Q Did you have the authority during that time
3 frame to assign a title to another employee?

4 MR. PEDICINI: Objection to the form
5 of the question.

6 A Let me think about that because as a funds
7 control officer we received hiring registers
8 from our HR personnel folks, and those came
9 through me to review.

10 But I was not an employee of personnel, and
11 my job description did not include hiring
12 employees or firing employees or establishing
13 title. But if there were -- if a position title
14 didn't fit with what we were going to fund and
15 it was a higher level and we could not fund that
16 position, say budget analyst 560 versus finance
17 specialist 501, then we would say we cannot hire
18 this level, we can hire this level, this is the
19 funding that we have.

20 So that would have been the role that I
21 would have played in the individual that
22 ultimately was hired into that position. And
23 that would be, that could be negotiated between
24 myself, between our administrator, you know, it

1 could be negotiated at several levels as far as
2 that grade that the individual came on board at.

3 Q So you played a technical role in that process,
4 but it wasn't in your discretion to decide which
5 employees had certain titles?

6 A That's right. That's a good evaluation. So
7 there was some involvement.

8 Q Okay. Did you have the authority during that
9 time frame to dictate how a regional office
10 would delegate its fund control
11 responsibilities?

12 MR. PEDICINI: Objection to the form
13 of the question.

14 A Say it again.

15 Q Did you have the authority during that time
16 frame by virtue of your position to delegate to
17 a regional office how it can or could not
18 delegate its funds control responsibilities?

19 A Delegate from one individual to another
20 individual?

21 Q For example, the regional administrator to a
22 subordinate employee?

23 MR. PEDICINI: What does she have to
24 do with this question?

1 MR. WILMOT: She has to answer and you
2 need to stop talking.

3 MR. PEDICINI: It's not related with--

4 MR. WILMOT: You can state your
5 objection, but with regard to your speaking
6 objection in terms of telling her how to
7 testify, I ask that you stop doing that.

8 A We conducted reviews of regional offices, and in
9 those reviews we would cite issues that would be
10 raised to the regional administrator's
11 attention, as far as shortcomings, as far as
12 areas we felt their staff may not be reading our
13 funds control policies.

14 So from that standpoint of review, as far
15 as problems and positive things and what we
16 would call best practices and exemplary
17 behavior, those we definitely had meetings with
18 our RAs and discussed those.

19 And certainly in the northeast region, we
20 had more positive comments I would say as far as
21 the management of their -- their financial
22 management operations during that period. And
23 we, in terms of best practices, we borrowed from
24 northeast for other regions.

1 Q Let me ask you in terms of an example. Take,
2 for example, the regional administrator decided
3 to delegate certain funds control
4 responsibilities such as certifying that funds
5 are available to one employee and not the
6 other.

7 It was not within your function to call the
8 regional administrator and tell him or her that
9 she could not do that, correct?

10 MR. PEDICINI: Objection to the form
11 of the question.

12 A I'll say that that didn't, that didn't come up
13 during the time period when I was at FNS.

14 That was not an issue that ever surfaced
15 because we pretty much placed our faith in the
16 branch chief and the RA because the funds
17 control officer -- my understanding was that
18 they briefed the RA directly. Monthly status
19 briefings were pretty much directly with the
20 RA.

21 So if there was an issue or a problem, then
22 it probably surfaced between the RA and the
23 funds control officer.

24 Q And you just gave some testimony as to the

1 Handbook 101 document.

2 I believe you testified that you had
3 occasion to revise that document?

4 A Mm-hmm.

5 Q Is that correct?

6 A Yes.

7 Q Those revisions to that document, were those
8 done within your discretion?

9 A Not just my discretion. Those had to be cleared
10 through my branch chief, through my budget
11 director, and we typically went out for a
12 comment.

13 Once we made revisions, then those were
14 commented on. We received comments on revisions
15 just to make sure that the southeast region, you
16 know, didn't have problems with something we
17 were attempting to provide guidance on.

18 Q Drawing your attention to Exhibit 10 there, how
19 did you obtain John Pedicini's name to include
20 on this list?

21 A Through his branch chief.

22 Q Do you have a specific memory of speaking to his
23 branch chief to include his name on this list?

24 A No, I would not have spoken. It would have been

EXHIBIT D

Volume I
Pages 1 to 59
Exhibit 77

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

- - - - -x
JOHN G. PEDICINI, :
Plaintiff, :
vs. : Civil Action
: No. 04-12395 JLT
UNITED STATES OF AMERICA, and :
ANN M. VENEMAN, SECRETARY, :
UNITED STATES DEPARTMENT OF :
AGRICULTURE, :
Defendants. :
- - - - -x

DEPOSITION OF JONATHAN LASH, a witness
called on behalf of the Plaintiff, taken pursuant to
the Federal Rules of Civil Procedure, before Laura
E. Antoniotti, Registered Professional Reporter and
Notary Public in and for the Commonwealth of
Massachusetts, at the Offices of Doris O. Wong
Associates, 50 Franklin Street, Boston,
Massachusetts, on Tuesday, August 2, 2005,
commencing at 1:15 p.m.

PRESENT:

The Catapano-Friedman Law Firm
(By Robert S. Catapano-Friedman, Esq., and
Sarah Catapano-Friedman, Esq.)
50 Franklin Street, Boston, MA 02110,
for the Plaintiff.

(Continued on next page)

1 with his questions. Thank you.

2 CROSS EXAMINATION

3 BY MR. WILMOT:

4 Q. Mr. Lash, are you a member of management at
5 USDA?

6 A. No, I am not.

7 Q. So does that mean you do not have the
8 authority to make any managerial decisions?

9 A. That's true.

10 Q. Have you ever had this authority?

11 A. No.

12 Q. Do you have the authority to assign a USDA
13 employee a certain grade level?

14 A. No.

15 Q. Have you ever had that authority?

16 A. No.

17 Q. Do you have the authority to give a USDA
18 employee a raise?

19 A. No.

20 Q. Have you ever had that authority?

21 A. No.

22 Q. Do you have the authority to promote a USDA
23 employee?

24 A. No.

1 Q. Have you ever had that authority?

2 A. No.

3 Q. Do you have the authority to assign a USDA
4 employee a certain title?

5 A. No.

6 Q. Have you ever had that authority?

7 A. No.

8 Q. Do you have the authority to assign a USDA
9 employee new job responsibilities?

10 A. No.

11 Q. Have you ever had that authority?

12 A. No.

13 Q. Do you have the authority to override an
14 employment decision made by a USDA management
15 person?

16 A. No.

17 Q. Have you ever had that authority?

18 A. No.

19 Q. I just want to bring your attention to
20 Exhibit 10. This is the list that you gave some
21 testimony on earlier.

22 Is this list -- and I know you didn't
23 prepare this list which is marked as Plaintiff's
24 Exhibit 10, but you said you currently maintain a

EXHIBIT E

Lisha A. Dorman 1-12-2006
John G. Pedicini v. United States of America, et al.

1

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF MASSACHUSETTS
3
4 -----
5 JOHN G. PEDICINI,
6 Plaintiff,
7 VS. CA No. 04-12395-JLT
8 UNITED STATES OF AMERICA
9 UNITED STATES DEPARTMENT
10 OF AGRICULTURE,
11 ANN M. VENEMAN, SECRETARY,
12 Defendants.
13 -----
14
15 Deposition of LISHA A. DORMAN, a witness
16 called on behalf of the Plaintiff, taken
17 pursuant to notice before Cindy M. Falcon,
18 Certified Shorthand Reporter and Notary Public
19 in and for the Commonwealth of Massachusetts, at
20 the O'Neil Federal Building, 10 Causeway Street,
21 Boston, Massachusetts, on Thursday, January 12,
22 2006, commencing at 9:20 a.m.
23
24

Lisha A. Dorman 1-12-2006
John G. Pedicini v. United States of America, et al.

42

1 Oh, sorry, it's 14, sorry. Wait a minute,
2 excuse me. It's 12, Paragraph 12. Paragraph
3 12.

4 MR. WILMOT: What's your question?

5 Q With regard to your affidavit, there is no USDA
6 policy granting backup funds officer the
7 authority to perform all of the functions of a
8 primary funds officer, is that true for E-TRVL
9 under Option 2 which you just read?

10 A No.

11 Q It's not true. So that's an exception to that
12 statement; is that correct?

13 A That is correct.

14 Q So it's your testimony here today that Paragraph
15 12 is not accurate?

16 MR. WILMOT: Objection. You can
17 answer.

18 A Okay. Let's talk about Paragraph 12. In
19 Paragraph 12, again, should a backup funds
20 officer be able to perform all the functions of
21 a funds officer?

22 Yes, I believe they should, but I cannot
23 produce any FNS policy that says they have to.

24 Q Is the E-TRVL delegation of authority part of

Lisha A. Dorman 1-12-2006
John G. Pedicini v. United States of America, et al.

43

1 USDA -- well, we are talking about FNS policy.

2 Is that part of FNS policy, at that time,
3 was that part of FNS policy to delegate Option 2
4 or Option 1 in E-TRVL? Was that policy at that
5 time?

6 MR. WILMOT: Objection. You can
7 answer.

8 A I don't know if I would call it policy, John.
9 We were configuring a system.

10 But again, I will go on to say that if and
11 when that system becomes a reality and is
12 implemented, then yes, at that point in time
13 that certainly would be policy. You would be
14 creating policy for FNS.

15 Q Okay. If we step back in March, just before the
16 funds officers' meeting, at that time, given the
17 mandate from the chief financial officer,
18 technically you were implementing --

19 A Absolutely.

20 Q -- E-TRVL at that time?

21 A That's right.

22 Q That was part of FNS policy at that time?

23 A Yes.

24 Q So we are talking now March of '05, and things

Lisha A. Dorman 1-12-2006
John G. Pedicini v. United States of America, et al.

44

1 have happened that no one has any control over
2 since then?

3 A Correct.

4 Q But at that time, given what went on, that
5 backup funds officers did have all of the
6 rights, including the right to certify funds
7 availability, that the funds officers had as
8 designated by NERO under Option 2; is that
9 correct?

10 MR. WILMOT: Objection. You can
11 answer.

12 A That is correct.

13 Q What do you know about, in your training of
14 funds officers, about the practice of backups in
15 the regions and their right to certify funds
16 availability?

17 A We have a variety across the whole agency, not
18 only just in the regions; and yes, we do have
19 backups.

20 Q What's the purpose of a backup?

21 A In some organizations the backup performs full
22 functions of the funds officer in their absence,
23 and yes, that does include certification of
24 funds.

Lisha A. Dorman 1-12-2006
John G. Pedicini v. United States of America, et al.

92

1 Q Ms. Dorman, have you had an opportunity to
2 review your affidavit today?

3 A Yes.

4 Q During the examination by Mr. Pedicini, he
5 directed your attention to Paragraph 12 of your
6 affidavit, particularly to the second sentence
7 in Paragraph 12 where it states that there is no
8 FNS policy, however, granting a backup funds
9 officer the authority to perform all of the
10 functions of a primary funds officer.

11 I think you said the exception to that
12 would be the TRVL system?

13 A The IAS system.

14 Q Having reviewed your affidavit today, is there
15 any other paragraph or -- strike that.

16 Having reviewed your affidavit today, any
17 other modifications that you think you need to
18 identify for us today on the record?

19 A No.

20 Q Okay. So you stand by what you attest to in
21 your affidavit?

22 A Yes.

23 Q A little bit more on this E-TRVL system.

24 Mr. Pedicini directed your attention to